

William Douglas, Esq; and Thomas Belfches, } Appellants.
his Trustee, - - - - -

Mrs. Isabel Douglas, - - - - - Respondent.

The CASE of the Appellants.

WILLIAM Earl of Morton gave, granted, and disposed the Lands and Barony of Kirkness to George Douglas, his second Son, and the Heirs Male of his Body; whom failing, to return to the Earl of Morton, and his Heirs; and upon this Charter the said George Douglas was duly infeft.

William then Earl of Morton, Grandson to the former Earl William, gave a new Charter to the said George Douglas (therein designed Sir George Douglas, and Uncle to the Earl), and to his Heirs or Assigns whatsoever, upon which Charter he was infeft.

The said Sir George Douglas was succeeded by his eldest Son Archibald; but it does not appear, that Archibald ever made up any Title to the Estate of Kirkness, or that he was infeft: But it does appear, that the Estate was apprised from him for Payment of his own, and of his Father's Debts; and that the said Earl of Morton (who granted the Charter 1607), was in Possession of the Barony of Kirkness, in consequence of these Apprisings, which were partly led at his own Instance, and partly acquired by him from others.

It appears, that the said Earl of Morton was infeft in the Barony of Kirkness, in the Year 1619, on a Charter granted by St. Leonard's College of St. Andrew's, Superiors to the Earls of Morton.

There was then a Tripartite Contract executed between the said William Earl of Morton, and Robert Lord Dalkeith, his eldest Son, on the First Part; and William Douglas of Kirkness, Son of the said Archibald, of the Second Part; and Elizabeth Brown, Mother of the said William Douglas, and William Keith, then her Husband, for himself, and as Cautioner for the said William Douglas, of the Third Part: "Whereby the said Earl of Morton, and his Son, renounced and overgave from them, their Heirs and Successors, to, and in Favour of, the said William Douglas of Kirkness, and the Heirs Male lawfully to be begotten of his own Body; which failing, to return back again to the noble Earl and Lord, their Heirs, Successors, and Assigns, all and whole the Lands and Barony of Kirkness (reserving the Right of Superiority of the same as formerly), together with all Right, Title, and Interest, which the said noble Earl and Lord then had, or might claim or pretend, to the said Lands, by virtue of any Apprising or Apprisings of the same, led and deduced at their Instance, or at the Instance of whatever Person or Persons to their Behoof, against Archibald the Father, or Sir George the Grandfather of the said William Douglas, or by virtue of any Right by them acquired from Elizabeth Brown, the Relict of the said Archibald Douglas, of her Life-Rent, Terce, or other Title competent, to her of the said Lands; so that the said William Douglas may presently enter to the foresaid Lands and Barony of Kirkness, and obtain himself infeft and seised therein, as Heir to his said Grandfather, and the Heirs Male lawfully to be begotten of his own Body; which failing, to return back again to the said noble Earl and Lord, and theirs above written, reserving to them the said Superiority as aforesaid; with full Power to the said William Douglas, and his Forefairs, immediately to enter to the actual and real Possession of that Half of the said Lands and Barony of Kirkness presently possessed by the said Earl and Lord, and their Tenants, and to the other Half on the Death of Dame Margaret Forrester, Widow of Sir George Douglas."

There follows a Clause, providing, "That if it shall happen the said William Douglas to depart this Life, leaving behind him no Heir or Heirs Male, lawfully begotten of his own Body, to succeed to the Lands, Barony, and others above written, but allennary Daughters and Heirs Female, one or more, where through the said Lands by virtue thereof, and by virtue of the Charter appointed to follow hereupon, will fall and appertain to the said noble Earl and his Son, their Heirs and Successors foresaid: In that Case the said noble Earl and his Son oblige them, their Heirs and Successors, to pay to the said Daughters and Heirs Female, certain Sums of Money for their Portions; and also, in case of Failure of Heirs Male lawfully begotten of the said William Douglas his own Body, to content and pay to William Douglas, Brother-german to the said Archibald Douglas of Kirkness, the Sum of One hundred Pounds Scots yearly, during his Life."

And farther "The said noble Earl and Lord bound and obliged themselves and their Forefairs to reiterate and renew the said Contract to the said William Douglas, and his above written, as oft as needful; and to make, subscribe, and deliver to them Precepts of Clare Constat Charters upon their own Resignation, or otherwise, containing Clause of *Novo Damus*, and all other Manner of Security requisite for denuding the said noble Earl and Lord, and theirs above written, of the said Lands and Barony of Kirkness, and others above specified, *omni habili modo*; and entering and securing the said William Douglas and his Forefairs therein, keeping always the Substance and Meaning above written: For which Causes, on the other Part, the said William Douglas renounces and overgives to the said Earl, and his Son, the Mill called Muckart-mill, and the Lands called the Common of Fossachquhie. And moreover, for the said noble Earl and Lord, and their Forefairs, their farther Security, anent the Succession to the said Lands and Barony of Kirkness, failing Heirs Male of the said William Douglas's own Body to succeed thereto, as said is, he binds and obliges himself, and his Heirs, to accept and receive, from the said noble Earl and Lord, a new Charter to the Lands and Barony of Kirkness to the said William, and the Heirs Male of his own Body; which failing, to return to the said noble Earl and Lord, their Heirs and Successors foresaid: Providing likewise, and by the said Charter to follow thereupon, it shall be specially provided and declared, that it shall be no ways leifon nor lawful to the said William Douglas of Kirkness, or his Heirs Male aforesaid, to sell, alien, or dispone, the foresaid Lands and Barony of Kirkness, or any Part thereof, to, and in Favour of any Person or Persons whatsoever, directly or indirectly, in Hurt, Prejudice, or Defraud of the said noble Earl and Lord, and their Forefairs, anent their Succession of the same; failing, the Heirs Male of the said William Douglas his own Body, in manner above written. As also the said William Douglas as Principal, and with him the said William Keith, as Cautioner and Surety for him, bind and oblige them conjunctly and severally, their Heirs and Executors, that the said William Douglas, at no Time after his lawful Age of Twenty-one Years complete, shall revoke his Obligements and Deeds above written; but, on the contrary, shall ratify and approve the same at his said lawful Age."

After which there follow Provisions in Favour of Elizabeth Brown, and William Keith her Spouse.

This Contract was produced and registered in the General Register of Seifines and Reversions, conform to the 16th Act of the Parliament 1617.

Pursuant to, and in Implement of, the aforesaid Contract, the said Earl of Morton, on the 28th of December, 1683, executed a Precept of Clare Constat in Favour of the said William Douglas, for infefting him in the foresaid Barony of Kirkness, as nearest and lawful Heir to his Grandfather Sir George Douglas; and, on the 18th Jan. 1639, the said William Douglas is infeft by virtue of the said Precept of Clare Constat, and his Seifin duly registered: And on the 16th April, the said Year, in farther Implement of the above recited Contract, Resignation is made upon a Procuratory, granted by the said William Douglas, in the Hands of the said Earl of Morton and Lord Dalkeith, his Son, Superiors; and a new Charter of Resignation is granted of the said Barony of Kirkness, in Favour of the said William Douglas, and the Heirs Male of his Body, "whom failing, to return back again to the said noble Earl and Lord, their Heirs and Successors whatsoever; which Charter contains the Prohibition to sell, alien, or dispone, in Prejudice or Defraud of the said noble Earl and Lord, and their Forefairs, their Succession to the said Lands; failing Heirs Male of the Body of the said William Douglas, or procreat of his Sons, who shall happen to succeed to him in the said Lands; reserving always to them and to their Heirs Male, who shall happen to succeed to them in the said Lands, Power and Liberty to provide and infeft their Spouses, one or more, in such competent Life-rents as they shall think proper for them. And farther, the said Charter contains a Provision for the Daughters of the said William Douglas, in case there should be no Heirs Male of his Body to take the Estate."

And, upon the foresaid Charter, the said William Douglas was infeft the 20th of May 1639; and his Seifine contains the foresaid Destination of Succession, and the Prohibition to alien in Prejudice thereof, which is duly registered in the said Year 1639.

By Contract of Marriage betwixt William Douglas of Kirkness, the Son of William last mentioned, who made the Contract with the Earl of Morton, and Lord Dalkeith his Son, he obliged himself to "settle the Estate on himself, and the Heirs Male of the Marriage then contracted betwixt him and Elizabeth Kirkaldy, his Spouse; which failing, to the Heirs Male of his Body of any other Marriage; whom all failing, to the Heirs Male and of Tailzie contained in the Infeftments granted to his said deceased Father of the said Lands and Barony."

The said William Douglas, in order to make up his Title to the said Lands, obtained a special Service and Retour of himself, as nearest Heir to his Father Sir William Douglas, conform to a Charter granted to the said Sir William, by William Earl of Morton, and Robert Lord Dalkeith his Son: Upon which a Precept was issued forth of the Chancery, directed

to the Principal and Masters of St. Leonard's College in St. Andrew's, that College being the Earl of Morton's Superior, in the Barony of Kirkness; because the then Earl of Morton, being charged to enter Heir to his Predecessor, the immediate Superior of the Lands, had delayed to enter himself; and, upon this Precept from the Chancery, ordering the said William Douglas to be infeft in the Barony of Kirkness, *salvo jure ejus libet*, the said Principal and Masters granted a Charter to the said William Douglas, his Heirs Male and Assigns; upon which he was infeft, in the Year 1667, by Seisin, bearing to the Heirs Male lawfully to be procreat of his Body; which failing, to his Heirs and Assigns.

N. B. This was altogether irregular and incompetent for the College, the remote Superior, to give a Charter, altering the Destination of Succession, or leaving out the Clause of Return to the Earl, and his Heirs, the true Intent and Effect of the Precept to the College being no more than that they should give Infeftment to William Douglas, upon his special Service, as Heir to Sir William his Father, in Terms of his Charter 1639, upon which Sir William died infeft.

The said William Douglas had Issue of his Marriage with the said Elizabeth Kirkaldy, Robert, afterwards Sir Robert Douglas, his eldest Son, who was Father to Major-General William Douglas, who died in the Year 1747 without Issue, and William Douglas a second Son, of whom the Appellant is the Grandson, and apparent Heir Male, and consequently is now the Heir Male of Sir William Douglas's own Body, who made the Contract above recited with the Earl of Morton in the Year 1638.

4th Nov. 1686. The said Robert Douglas, the eldest Son of William Douglas, of Kirkness, by Elizabeth Kirkaldy, obtained from Sir William Bruce, of Kinross, a Precept of *Clare Constat*, as Heir to William his Father, and to Sir William his Grandfather, who died last vest and seised as of Fee, conform to a Charge granted by William Earl of Morton, and Robert Lord Dalkeith his Son, to the said Sir William Douglas: But there is no Seisine produced (although called for), nor upon Record in the Name of the said Robert, upon that Precept. Notwithstanding which the said Robert Douglas took upon him, as if he had been truly infeft in the Lands, to execute a Procuratory for resigning the same; and, upon his Resignation of that Date, obtained a Charter from Sir William Bruce, proceeding upon the said Procuratory, and granting the Lands and Barony to him the said Robert, his Heirs and Assigns whatsoever; and this was the first Attempt towards altering the Succession of this Barony, made by the Contract with the Earl of Morton in the Year 1638, and yet before any Seisin taken upon this new Charter, and whilst it yet remained a latent personal Deed, without being openly published or avowed.

10 Nov. 1687. The said Robert Douglas entered into a Contract of Marriage with Jean Balfour, Daughter of John Lord Burleigh, to which Contract his younger Brother William, the Grandfather of the Appellant, was made privy, and subscribing as an instrumentary Witness, as also most others of the Relations of the Family, whereby the said Robert Douglas becomes bound "to provide the Barony of Kirkness to himself, and the Heirs Male of that Marriage; which failing, to his Heirs Male and Assigns whatsoever: And farther obliged himself, as the Heirs Female of the Marriage betwixt him and the said Jean Balfour his Spouse were wholly secluded and debarred from the Succession to the Lands, to pay certain Portions therein mentioned to the Daughters of that Marriage, in case there should be no Issue Male thereof to take the Estate."

19 April 1689. And yet, notwithstanding the said Contract of Marriage, on the 19th of April, in the Year 1689, the said Robert Douglas procured himself to be infeft in the Barony of Kirkness, upon the Precept in the Charter of 1687; which, upon his own Resignation (without having Power to resign the said Lands, as he was not seised therein), he had obtained to himself, and his Heirs, and Assigns whatsoever.

13 Feb. 1696. The said Robert Douglas executed an Entail, narrating his Contract of Marriage as the last Settlement of the Estate, by which he provides the Estate to the Respondent and her Sisters, in Prejudice of his Son's Daughter, as well as the Heirs Male of the former Investitures; the Deed now appearing cancelled, by the Subscription being taken from it, ought not to have been founded upon.

21 Nov. 1721. The said Robert, then Sir Robert Douglas, executed a Settlement of this Estate in Favour of his only Son therein designed, Colonel William Douglas, and the Heirs of his Body; whom failing, to Isabel the eldest Daughter of the said Sir Robert, that is the Respondent, and the Heirs of her Body; whom failing, to his four other Daughters therein named in their Order, and the Heirs of their respective Bodies; whom all failing, to his nearest Heirs and Assigns whatsoever. In this Settlement Sir Robert reserves a Life-rent to himself (and his Wife, as impowered by the Contract 1638, and his own Contract of Marriage); and it is granted with the farther Burden of the Debts which the Father then owed, being a Condition which the Law implied.

29th Oct. 1722. The said Colonel was infeft on the Precept contained in the Settlement last mentioned. And, on the 30th December, 30th Dec. 1725. the said Colonel made up a farther Title to the Barony of Kirkness, on Sir Robert his Father's Death 1725, by a Precept of *Clare Constat* granted by Sir Thomas Bruce the Superior to him, as nearest and lawful Heir to Sir Robert Douglas his Father, and, upon that Precept, he was of the same Date infeft.

30th Sept. 1741. The said Colonel Douglas executed a new Settlement of the said Lands, failing Heirs of his own Body, to the Respondent Isabel, his Sister, and the Heirs of her Body, whom failing, to his other four Sisters successively, and the Heirs of their respective Bodies; whom all failing, to his own nearest Heirs and Assigns, reserving to himself a Power to alter the same, and dispensing with the Delivery.

18th Sept. 1748. After the Death of the said Colonel, who had become Major General Douglas, the Respondent executed the Procuratory contained in his Settlement last mentioned, by resigning the Lands for new Infeftment, in the Terms thereof, in the Hands of Sir John Bruce, of Kinross, the Superior, who granted a new Charter accordingly, upon which she was infeft the Twenty-second of November 1748.

The Appellant, who is now the lineal Heir Male of the Body of Sir George Douglas, who got the Barony of Kirkness, from his Father, William Earl of Morton, in the Year 1595, as an Appendage to himself, and the Heirs Male of his Body, whom failing, to return to the said Earl, and his Heirs and Assigns, as also of Sir William Douglas, of Kirkness, who acquired a new Title to the Lands by the Contract with the Earl of Morton above recited in the Year 1638, and Infeftment following thereon (after the Earl had acquired the Property of the Lands on expired Apprisings), being advised, and conceiving himself to be aggrieved by these Settlements made by Sir Robert Douglas, and Major General William Douglas his Son, and that the same was in Defraud of his Right, and the Return to the Family of Morton, and consequently exceeded the Powers competent to them respectively, by the precedent Titles to the said Lands. In order to reduce these gratuitous or voluntary Settlements, he granted a Trust Bond to Mr. Thomas Belsches, who thereupon brought an Adjudication against the Appellant, as Heir Male of the Barony of Kirkness, in which Action Appearance was made for the said Isabel Douglas, who opposed the Adjudication upon her Title to the Lands as above stated, and consented by her Council, that the Validity of her Right should be tried in this State, in the same Manner as if the Appellant's Title had been completed by an Adjudication, and as if he had brought a Reduction of the gratuitous Settlements made by Sir Robert, and General Douglas, her Father and Brother, whereupon the Lord Woodhall, Ordinary, by Interlocutor 21st June 1751, "found in respect of the said Consent, the Appellant intitled to go on and compete, and insist here as if he had an Adjudication, and a proper Process upon it." After which, the Cause having been fully debated before the Lord Ordinary, he took the Debate to report to the whole Court, and directed Informations to be given in.

3d Feb. 1753. On Report of the Lord Woodhall, "the Lords repel the Reasons of Reduction, and assoilzie from the Process of Adjudication, and decern." Against this Interlocutor and Decree, the Appellant and his said Trustee have appealed for the following, amongst other

R E A S O N S :

REASON I. That by the Nature and Quality of the Titles to the Lands and Barony of Kirkness (as well by the original Grant made by William Earl of Morton in 1595, to George Douglas his second Son, and the Heirs Male of his Body, whom failing, to return to the said Earl and his Heirs, as by the second or renewed Grant in the mutual Contract of 1638, whereby William then Earl of Morton, and his Son, who had acquired the Property of the Lands, grant the same again to William Douglas, and the Heirs Male of his Body, which failing, to return back again to the said Earl and his Heirs and Successors, to which is added, an express Proviso and Declaration, that it should not be lawful to the said William Douglas, or his Heirs Male as aforesaid, to sell, alien, or dispone the said Lands, or any Part thereof, directly or indirectly, in Hurt, Prejudice, or Defraud of the said Earl, and his Son, or their Forefathers, their Succession to the same, failing of the Heirs Male of the Body of the said William Douglas; there was an Order or Limitation of Succession established that was not alterable or defeasable by any voluntary or gratuitous Deed of the Grantee's, or their Male Descendants, either in Defraud or Prejudice of the Return to the Family of the Earl of Morton, when that should take Place, or in Prejudice of the future Male Descendants of that younger Branch of this noble Family, to whom the Succession is provided in their Order preferably to the Reversion or Return to the Earl himself, and his Heirs, and therefore the voluntary Deeds of Settlement, under which the Respondent claims or holds the Lands, cannot make a good Title, but ought to be set aside, as having been Infractions of the original Condition or Quality under which the Estate was granted.

That

- That the Attempt to alter the original Limitation of this Estate, made by Robert Douglas, in the Year 1687, by obtaining a Charter upon his own Resignation, to himself, his Heirs, and Assigns whatsoever, was ineffectual and void; by Reason that the said Robert was not previously seised or infeft in the Lands, as Heir of the former Investiture, without which he had it not in his Power to resign the Lands for new Infeftment; and the Title of Major General Douglas, being derived only from Sir Robert his Father, laboured under the same Defect; and consequently the voluntary Settlements made by them severally to their Heirs Female were void, as neither of them had made up a perfect or lawful Title to the Estate.
- That, by the Contract 1638, the Return of the Lands, or Substitution of the Earl of Morton, and his Heirs, was only to take Place in the Event of William Douglas, the Party to that Contract, his dying without Issue Male in the first Degree, or Sons of his own Body, the Grant being to him, and the Heirs Male lawfully to be begotten of his own Body; in Default of which there are Provisions made for his Daughters by the said Contract, and no such Provision for the Daughters of any succeeding Heirs Male.
- The Limitation to William Douglas, and the Heirs Male of his own Body, by the Force of the Words, and their common Construction, and reasonable Intent of the Parties to the Contract, can only be understood as used in Opposition to his collateral Heirs Male, even as in Charters made out in Latin, these are opposite or distinct Terms, and the Grant may be to A. et Heredibus masculis legitime procreandis e corpore ejus, or to A. et Heredibus suis masculis quibuscunque, which includes his collateral Heirs Male. And if this William Douglas had died, leaving a Grandson by his eldest Son, and a second Son who survived him, there would surely be no Place for the Return to the Earl of Morton, nor yet could the second Son claim to be Heir Male of his Father, whilst there was a Son of his elder Brother living, who was truly the lawful Heirs Male, descended of the Body of his Grandfather: And it is no wise conclusive for the Objection, that, by the Terms of this Contract, the Earl of Morton agreed to make Provision for the Daughters of William, in case he should die without leaving Issue Male to take the Estate, whereby the Return or Reversion might speedily take Place, and makes no Provision for the Daughters of After-Generations, when the Return to the Earl's Family might become more distant and uncertain, by the Existence of a numerous Male Issue of William Douglas; neither is it usual to make such Provision for the Daughters of After-Generations, though nothing is more frequent than a Limitation to Male Descendants in infinitum, or as long as they shall exist; and no Example can be produced of such Limitation of an Estate in Lands as the Objection alleges, to a Man's Sons, or his Issue Male in the first Degree, and then to break off, excluding his Grandsons, or remoter Male Descendants.
- That supposing the Clause of Return to the Earl and his Heirs, secured by the aforesaid Prohibition, could not be defeated by voluntary Deeds; yet no Right does thereby accrue to the Heirs Male descended of William Douglas; but the Proprietor for the Time being might alter the Succession, in Prejudice of the succeeding Heirs Male of William's Body.
- That the Clause of Return, conceived in Favour of the Earl and his Heirs, operates equally in Favour of all the intermediate Heirs Male, as it was in and through them, that the Estate was ultimately to be transmitted to the Earl himself. The Prohibition against defeating the Return, proves, a fortiori, that the precedent Substitution of William's Male Descendants could not be gratuitously altered, for the primary Intent of the Grant was for the Support of that younger Branch of the Family in the Male Line; failing which, the Return was but a secondary and unwished for Event; and it is absurd to suppose, that remote Substitutes, the personæ minus dilectæ, should have a stronger and greater Interest in the Estate, than those who are manifestly the prædilectæ personæ; the Prohibition therefore to alienate in Prejudice of the last Substitution or Return, must operate equally in Favour of all the intermediate Heirs Male, who were preferred in the Succession to the Earl himself, and his Heirs; for if the Substitution in its last Branch, could not be gratuitously defeated, far less could the preferable Branches be disappointed of their Right, whom the Earl of Morton, and his Son, by the Contract obliged themselves, and their Heirs and Successors, from Time to Time, to enter and secure in the said Lands and Barony, keeping always the Substance and Meaning above written; that is, the Limitation to William Douglas, and his Male Descendants, as well as the Return to the Earl and his Heirs, on their Failure.
- The express Prohibition to alien was manifestly calculated to protect and secure the last Substitution or Return; and to have that Effect, it must operate upon all who by the Deed were intended ever to have a Power or Opportunity of Alienation, and of defeating the Return: If any Power whatsoever to alien by an Heir Male had been understood to exist under the Limitations of the Deed, the Prohibition for Security of the Return must have been general and co-extensive with the Power against which the Return was to be protected; but the Prohibition extends only to Heirs Male, and therefore proves that no other was intended or understood to be invested with the Power to alien; that is, with the Property of the Estate: And thus the very Alteration of the Line of Succession is an Infringement of the Prohibition; for, there being no Prohibition on the Heirs General of any Heir Male from disposing, the Alteration of Succession is that indirect Disposition which the Prohibition guards against.
- That, after the Contract 1638, Sir William Bruce, of Kinross, acquired the Superiority of the Estate of Kirkness, and thereby became intitled to the Benefit of the Clause of Return, which he departed from by granting a Charter in 1687 to Robert Douglas, and his Heirs and Assigns whatsoever.
- The Clause of Return to the Earl of Morton, failing Heirs Male of the Vassal's Body, concerned the Property of the Lands granted to William Douglas, and had no Connection with the Superiority, which remained with the Earl as a distinct Estate: The Return, or Right of Substitution, would have had the same Effect, though the Earl of Morton had conveyed the Estate of Kirkness to William Douglas, not to be holden of the Earl and his Heirs, but of their own immediate Superiors; and consequently the Earl's being divested of the Superiority could not affect the Succession to the Property, which was in the Vassal, limited to the Heirs Male of the Vassal's Body; and, upon their Failure, to return to the Earl of Morton, and his Heirs; which Return, or distant Chance of Succession, did not belong to the Earl of Morton as Superior, but as Donor of the Property of the Lands, for a particular Purpose; namely, for the Support of a younger Branch of his Family in the Male Line; and, upon the Failure of that Purpose, to return to his own Heirs: That Hope, or Chance of Succession, therefore, could not pass with the Superiority, with which it was no ways connected; and, if all the Issue Male of William Douglas were extinct, the Earl of Morton at this Day would be intitled on the Foot of the Contract 1638; and the Charter 1639, to be served Heir of Provision in the Property of these Lands, to Major-General Douglas last deceased, and to be received as such by the now Superior thereof.
- That the Appellant stands excluded by negative and positive Prescription, the Lands having been possessed under a Limitation to Heirs and Assigns whatsoever, ever since the Charter of Resignation in 1687, to Sir Robert Douglas, the Respondent's Father, and Seisin thereon in 1689, by which Possession the Property of the Lands are acquired to Sir Robert Douglas, and his Heirs General.
- That, besides the Nullity of the Charter of Resignation 1687, there are not, in the present Case, Termini habiles, either for the negative or positive Prescription; it being an agreed Fact, that this Estate has been all along possessed and enjoyed by the Heirs Male descended of the Body of William Douglas, Party to the Contract of 1638, down to the Year 1747, when Major-General Douglas died; for that these Heirs Male could not acquire by Prescription in their Character of Heirs of Line against themselves in their Character of Heirs Male: While both Characters united in the same Person, there could be no Prescription; for that is an Acquisition of Property, by Possession of one who is not the true Owner, during the Time required by the Law, viz. 40 Years; and it supposes the true Owner out of Possession, and neglecting to claim his Right; and that there is one Party acquiring, and another losing the Property by such long Possession: But here, till the Death of Major-General Douglas in 1747, the Possessors of the Lands in question were always Heirs Male as well as Heirs of Line; and, in such Case, the remoter Heirs Male could have no Title to the Lands, or Access to the Possession, and therefore were not guilty of any Neglect of asserting their own Right: The Appellant's Claim did not arise till the Death of the Major-General, without Heirs Male of his Body, when the two Lines came to split; and, till that happened, the Appellant was non valens agere cum effectu, or intitled to recover the Possession of the Estate; and, in such a Case, his Right cannot be cut off by Prescription; for he has not forfeited the same by any Neglect; nor could Sir Robert Douglas, or his Son, sustain a double Person, or acquire against themselves, as the Respondent might acquire against the Appellant, in case he had been permitted, without Interruption, to possess for 40 Years; nor could they fraudulently change the Cause of their Possession, to create a new Title for Prescription to run upon.
- That, in the present Case, the remoter Heirs Male not only saw the Estate possessed by the Male Descendants of William Douglas in their Order, in Terms of the Contract 1638; but the Appellant's Grandfather, William Douglas, (the Brother of Sir Robert, who had taken the Charter 1687, to Heirs and Assigns), about eight Months after the Date of the said Charter, whilst it remained a latent personal Deed, without Infeftment taken thereon, was called upon by his Brother Sir Robert to witness his Contract of Marriage, in which Sir Robert settles the Estate in the Male Succession, in Exclusion of the Daughters of the Marriage, who are the now Respondent and her Sisters, which served to mislead and deceive the Appellant's Grandfather into a Belief, that Sir Robert had no Intention to alter the Limitation of Succession.

That

Obj. V.

ANSWER.

That the Disposition 1721, from Sir Robert Douglas to his Son the General, was an onerous Deed, being granted with the Burden of the Father's Debts, and a Reservation of his own Life-rent, and his Lady's Jointure. By the Law of Scotland a Conveyance from a Father to his eldest Son is held to be an Anticipation, or *Preceptio Hereditatis*, which subjects the Son to all the anterior Debts of the Father, in like Manner as if the Son had taken the Estate by Succession after the Father's Death, which in fact General Douglas did; having, after the Death of Sir Robert, made up his Title to the Estate by a Precept of *Clare Constat* from the Superior, upon which he was infeft, whereby he subjected himself to his Father's Debts universally; and, so far as the General has paid these, he has fulfilled his own Obligation, and freed the Estate from the Debts and Incumbrances which Sir Robert his Father had contracted: But the Amount of such Debts, whether standing out or extinguished, can have no Effect or Operation in the Question, touching the Succession to the Estate on the Death of General Douglas, farther than that the same will be more or less beneficial to his Heirs, as the Debts so standing out are more or less in Extent. Since, therefore, the Appellant William Douglas, Esq; is now the Heir Male of the Body of Sir William Douglas, Party to the Contract of 1638, and has brought his Claim as soon as the Succession opened to him by the Death of Major-General Douglas, when, for the first Time, a Female Heir claimed the Possession of the Estate, in virtue of voluntary Deeds made inconsistent with the Terms of the original Grant 1638;

The Appellants humbly hope, That your Lordships will reverse the Interlocutor or Decree of the 3d of February, 1753, complained of, and set aside the voluntary Settlements under which the Respondent claims, and sustain or declare the Appellant's Title as the Rightful Heir to the Barony of Kirkcubright.

W. GRANT.
W. MURRAY.
A. HUME-CAMPBELL.

William Douglas, Esq;
AND
Thomas Belches, his Trustee,
} Appellants,
Mrs. Isabel Douglas,
Respondent.

The CASE of the Appellants.

To be heard at the Bar of the House of Lords, on the Day
of January, 1754.

*Ordered by the Judges That the Appellant be Dismissed
And that the Interlocutor therein complained of be
affirmed.*